

CATCHWORDS

Administrative law - migration - whether marital relationship between appellant and spouse was genuine and continuing - whether question of fact or of law.

Migration Act 1958 - ss.368, 476

Migration Regulations 1993 - r.100.333

Minister of State for Immigration, Local Government and Ethnic Affairs v Dhillon (8 May 1990, unreported).

PREM CHAND v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

No. NG42 of 1997

BEAUMONT, LINDGREN, LEHANE JJ.
SYDNEY

27 MAY 1997

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) **No. NG42 of 1997**
)
GENERAL DIVISION)

BETWEEN: PREM CHAND
Appellant

AND: MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS
Respondent

CORAM: BEAUMONT, LINDGREN, LEHANE JJ.
PLACE: SYDNEY
DATED: 27 MAY 1997

MINUTES OF ORDERS

THE COURT ORDERS:

1. That the appeal be dismissed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT
(Ex tempore)

BEAUMONT J: This is an appeal from a decision of a Judge of the Court, Wilcox J., dismissing an application for the review of a decision of the Immigration Review Tribunal (“the Tribunal”) in connection with an application by the appellant, Prem Chand, for the issue of a visa to Sunita Devi.

The evidence before the Tribunal, accepted by it and by the learned primary Judge, established that Mr Chand was a native of Fiji who had come to Australia in February 1987 as a tourist. In April 1988 he married an Australian permanent resident and consequently obtained a right of permanent residence in Australia. That marriage was not successful and the relationship was dissolved in July 1990.

Mr Chand, however, became an Australian citizen on 3 September 1991. In the following year, Mr Chand and his mother visited Fiji, arriving in that country on or about 15

November 1992. The appellant gave evidence before the Tribunal that the purpose of the visit was for a holiday, but that he had also asked his mother to arrange a girl for him to marry. There was evidence that prior to the visit, Mr Chand's mother had spoken to her sister about arranging a suitable girl for her son. Shortly after arrival in Fiji, Mr Chand and the members of his family met with Ms Devi, who was not then married, and members of her family.

After discussion, a marriage was arranged and was performed shortly thereafter in Fiji on 24 November 1992. The evidence before the Tribunal, and this was not contested before the primary Judge, was that the ceremony was a traditional Hindu wedding ceremony lasting two days, that about forty guests were present and that the cost of the wedding was approximately \$5000. The couple honeymooned in Fiji for two weeks.

Mr Chand then returned to Australia, leaving Ms Devi in Fiji. Either Mr Chand or Ms Devi made an application for a visa for her to visit Australia. It is not clear who the applicant was for the visa, but it seems that Mr Chand was to be the sponsor for the purpose of the application.

However, shortly after the application was lodged, Mr Chand wrote a letter withdrawing it. Early in 1993, a further application was made but that application was also withdrawn. The explanation which was given to the Tribunal for these withdrawals was that Mr Chand was involved at the time in a relationship with another woman in Australia, and that this woman was unhappy with the prospect of Ms Devi coming to Australia.

In his evidence before the Tribunal, Mr Chand said that he wished to establish a normal married life with Ms Devi; she also made the same claim. However, as the learned primary Judge observed, the Tribunal was not satisfied about the genuineness of these claims.

In coming to this conclusion, the Tribunal examined the circumstances concerning the relationship between the parties and, in particular, the circumstances in which the previous applications for the issue of a visa had been withdrawn.

The Tribunal also noted a number of inconsistencies in the evidence of Mr Chand and Ms Devi about the extent of her knowledge of first, what had happened in relation to the application for the issue of the visa and secondly, of Mr Chand's relationship with the other woman in Australia.

In the course of its reasons, the Tribunal said:

"Mr Chand told the Tribunal that his wife is not working in Fiji and he is supporting her financially by sending her \$50 per fortnight. He contacts his wife by telephone two to three times a month and his wife also writes to him. The financial support for [Ms Devi] and the communications between the couple are supported by the new evidence given to the Tribunal."

The Tribunal went on to refer to evidence received by the Tribunal, including the following:

"• Telephone bills which showed a total of 152 calls over a period of 28 months between November 1992 and February 1995 and averaging 5.4 calls per month;

- *Items of correspondence which included two cards and three letters for 1994 and four cards and six letters for 1995;*
- *Documentary evidence of financial support for the Principal over a period of 16 months between December 1993 and February 1995 which totalled about \$3,000 Fijian dollars, and averaging about \$180 Fijian dollars [approximately \$AUS180] per month;*
- *Statement by the Applicant that he was in Fiji on three different occasions, i.e. 28 February to 25 March 1993, 31 October 1993 to 14 November 1993 and 22 December 1993 to 5 January 1994. The Applicant also stated that he intended to travel to Fiji on 15 April 1995.*
- *Statement by the Applicant's mother stating that the marriage between Sunita and her son [sic]."*

The Tribunal, with reference to the evidence given by Ms Devi to the Tribunal by telephone link, went on to say:

"Ms Devi was an extremely unresponsive witness. She gave evidence that contradicted that of her husband. She said that her husband had told her about the fact that he had written the letters as early as 1993. This contradicted her husband's evidence which was that he had told her about the letters only in 1995 after being asked to do so by the Tribunal. It also made the entire set of events even harder to understand given that there would appear to have been no need to continue with the withdrawal of the application if, as early as 1993, Ms Devi was made aware of the fact that Mr Chand had written the letters. In other words, the threat of disclosure to Mr Chand's family could not have much weight if Mr Chand had already disclosed his misbehaviour to his alleged wife.

Subsequently, after hearing Ms Devi's evidence, Mr Chand changed his evidence and purported to remember that he had in fact told his wife about his part in writing the letters at or about the time they were written. But, as noted above, this makes little sense"

The Tribunal then proceeded to express its conclusions in these terms:

"For the Tribunal to be satisfied that it could set aside the previous decision it would have to accept that Mr Chand and Ms Devi were witnesses of truth. Mr Chand has repeatedly given contradictory evidence to the Department and to the Tribunal. The evidence is not about a minor matter. The Tribunal is still

not sure that it really understands the true reason for the drafting of the letters withdrawing Mr Chand's support. Whatever those reasons may be, the Tribunal is of the view that it cannot accept Mr Chand as a witness of truth and it cannot therefore accept uncorroborated his claim that the marriage is genuine. Ms Devi's evidence is likewise difficult to accept particularly in the light of her claim, which must be seen as ridiculous in the circumstances, that she has known since 1993 about the fact that her husband wrote the letters.

The Tribunal is conscious that there is a deal of evidence in support of the proposition that Mr Chand and Ms Devi have a genuine relationship, including evidence of communication between the parties, payments of money by Mr Chand to Ms Devi, and the support of both families to the arrangement. But this evidence is also consistent with a sham marriage, and perhaps with other relationships falling short of genuine marriage.

The Tribunal is also conscious that it should be careful not to impose expectations or stereotypes which are inappropriate to the peer group of the applicants, and that it must consider the composite picture, not just one aspect of the relationship: see Lynam v Director-General of Social Security (1983) 52 ALR 128, 131.

The Tribunal is obliged to decide whether external signs show that there is a genuine and continuing relationship between the parties. Because the Tribunal cannot accept the evidence of the major players in this application, the Tribunal cannot accept their claims that they have a genuine and continuing relationship as husband and wife."

The application for judicial review heard by the learned primary Judge was grounded on a submission that the Tribunal had erred in law in its approach to the matter.

The context in which the question arose for decision by the Tribunal was, as stated relevantly in Regulation 100.333 of the Migration Regulations (1993), in these terms:

"The Minister is satisfied that the marital relationship between the applicant and the applicant's spouse is genuine and continuing."

For present purposes, the satisfaction is to be that of the Tribunal which, relevantly, stands in the shoes of the Minister. As the learned primary Judge said (at p.6), and this is not

in dispute, the regulation should be understood as requiring that the Tribunal be satisfied that the marital relationship is genuine and continuing.

The learned primary Judge went on to refer to a statement of principle which, again, is not contentious, and is to be found in the decision of a Full Court of this Court in Minister of State for Immigration, Local Government and Ethnic Affairs v Dhillon (Northrop, Wilcox and French JJ, 8 May 1990, unreported). In that case the Full Court said:

“The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.”

Having considered the reasons of the Tribunal and the submissions made on behalf of the applicant for judicial review, the learned primary Judge concluded that, in essence, the matter involved a factual issue only and that it had not been demonstrated that any error of law had been made by the Tribunal.

Mr Chand now appeals to this Court against the dismissal of the application for judicial review. In support of the appeal, it is submitted that the Tribunal made an error of law within the meaning of s.476(1)(e) of the Migration Act (1958) (“the Act”). It is accepted by the Minister that this Court has jurisdiction to order judicial review if such an error is demonstrated. Subject to s.476(2), s.476(1)(e) provides that an application may be made for review by the Federal Court of a judicially reviewable decision on the ground:

“that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision.”

By s.476(2) it is provided that the following are not grounds upon which an application may be made under s.476(1): (a) that a breach of the rules of natural justice occurred in connection with the making of the decision; and (b) that the decision involved an exercise of power that is so unreasonable that no reasonable person could have so exercised the power.

It is submitted on behalf of the appellant that the Tribunal erred in law by either incorrectly applying the law or incorrectly interpreting the applicable law, by failing to take into account certain material facts to which I will refer shortly. Reliance is placed on behalf of the appellant upon the provisions of s.368(1) of the Act in particular. By that provision, where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that: (a) sets out the decision of the Tribunal on the review; (b) sets out the reasons for the decision; (c) sets out the findings on any material questions of fact; and (d) refers to the evidence or any other material on which the findings of fact were based. Specific reliance is placed on behalf of the appellant on s.368(1)(c), and it is contended, as the principal submission advanced on behalf of the appellant, that the Tribunal here made a decision in respect of only part of the evidence and not the whole of the evidence.

The context in which this submission is made is that there were before the Tribunal really two bodies of evidence. The so-called “first body of evidence” could be described as the statements and testimony given to the Department and the Tribunal, by Mr Chand and Ms Devi. This “first body of evidence” was constituted, in substance, by the oral evidence in support of the application for the issue of a visa. The “second body of evidence” mentioned on behalf of the appellant is that referred to by the Tribunal as comprising evidence of communication between the parties, evidence of payments made by Mr Chand to Ms Devi

and evidence of the support of both families to the relationship between Mr Chand and Ms Devi.

The contention advanced by the appellant is that the Tribunal not only referred, but appears, so it is said, to have relied exclusively upon the “first body of evidence”, and failed to refer to, that is to say, failed to take into account, the “second body of evidence”.

I have difficulty accepting the argument. It is true that the Tribunal in its express conclusions gave considerable significance to the oral evidence, or, as it has been described, the “first body of evidence”. However, from the passages from the Tribunal’s published reasons which I have set out, it is clear that the Tribunal also had regard to, and took into account, the “second body of evidence”. Not only did the Tribunal recite the evidence described as the “second body of evidence”, but in its concluding remarks the Tribunal made it clear, in my view, that whilst the “second body of evidence” was material, the Tribunal had formed the conclusion, on the whole of the material before it, that the picture that emerged from the “first body of evidence”, that is to say, the oral evidence, was, in the view of the Tribunal, the body of evidence that had the real weight.

In my view, it was open to the Tribunal to take that approach. More particularly, in my opinion, there was no error of law by the Tribunal, either as a matter of the application of the law, or in the Tribunal’s process of interpretation of the law, or in the conclusions arrived at by the Tribunal.

I am respectfully in agreement with the learned primary Judge that in this case, no error of law is shown, and that, on the contrary, the matter in all material respects involved only an issue of fact. In my opinion, therefore, the appeal must fail and should be dismissed.

LINDGREN J: I agree with the learned presiding Judge, both as to his conclusion and his reasons, and add the following observations.

First, I have difficulty understanding how the ground referred to in section 476 (1) (e) of the Act relates to the kind of case which has been put for the appellant.

Secondly, with reference to the first sentence in the fourth last paragraph of the Tribunal's Reasons for Decision, which is set out in the reasons of the learned presiding Judge ("For the Tribunal to be satisfied ..."), I do not think that the Tribunal was purporting in that sentence to apply a general principle of law. In other words, I do not think that the Tribunal was purporting to say that it was a requirement of law that in any case of the present kind the Tribunal would have to be in a position to accept that the principal witnesses were witnesses of truth. Rather, it was saying that in the circumstances of this particular case, it would have had to be satisfied that those persons were witnesses of truth in order to reach the conclusion that the marital relationship between them was genuine and continuing.

The third matter relates to the third last paragraph of the Tribunal's Reasons for Decision, which is also set out in the Reasons for Decision of Beaumont J ("The Tribunal is conscious that ..."). The references in that paragraph to "communication between the parties", "payments of money" and "the support of both families to the arrangement", are clearly references to the objective evidence, details of which had been set out earlier in the

Reasons for Decision of the Tribunal, and which are also referred to in the Reasons for Judgment of Beaumont J and referred to by his Honour as the “second body of evidence”. It is clear that in the third last paragraph of its Reasons for Decision, the Tribunal had in mind that objective evidence.

The fourth matter to which I would refer is the final sentence in the third last paragraph of the Tribunal's reasons for decision:

“[b]ut this evidence is also consistent with a sham marriage, and perhaps with other relationships falling short of genuine marriage.”

In that sentence, the Tribunal was saying, in effect, that the objective evidence, in the sense of the evidence other than the statements made by the two individuals principally involved and their testimony, is not evidence from which the Tribunal would draw the conclusion that the marital relationship between them was genuine and continuing. In this way, the Tribunal did, in my view, deal with that evidence with which, the appellant suggests, it failed to deal.

Fifthly and finally, I turn to the last paragraph in the Tribunal's Reasons for Decision, which is also set out in the Reasons for Decision of the presiding Judge (“The Tribunal is obliged ...”). The reference to “external signs” in that paragraph could refer to either one of two things. It could be a reference to the objective evidence alone. On the other hand, it could be a reference to both that evidence and the statements and testimony of the two individuals concerned. The latter view perhaps gains support from the nature of that of which the Tribunal had to be satisfied. It had to be satisfied that:

“the marital relationship between the applicant and the applicant's spouse [was] genuine and continuing.”

This is a matter of inference and conclusion to be derived from all relevant evidence, including testimonial evidence and other statements by the two persons concerned. But whatever the expression "external signs" means, it is clear that in the final sentence the Tribunal is stating that it does not accept the evidence, on any issue material to the ultimate issue for decision, given by the two individuals principally concerned. In effect, the Tribunal is saying that, left, as it would then be, with the objective evidence without any support or explanation from the two individuals, the Tribunal does not infer that the marital relationship is genuine and continuing.

LEHANE J: I also agree with the conclusions stated by the learned presiding Judge and with his reasons. I agree also with each of the additional observations made by Lindgren J.

I certify that this and the preceding ten (10) pages are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 27 May 1997

Counsel for the Applicant:	J Young
Solicitor for the Applicant:	Newman & Associates
Counsel for the Respondent:	F Backman
Solicitor for the Respondent:	Australian Government Solicitor
Dates of Hearing:	27 May 1997
Date of Judgment:	27 May 1997